

APPENDIX TO BRIEF.

CHAPTER 38—POST-CONVICTION PROCEDURE.

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40-3801. Title.—This chapter may be referred to as the "Post-Conviction Procedure Act." [Acts 1967, ch. 310, § 27.]

40-3802. When prisoners may petition for post-conviction relief.—A prisoner in custody under sentence of a court of this state may petition for post-conviction relief under this chapter at any time after he has exhausted his appellate remedies or his time for appeal in the nature of a writ of error has passed and before the sentence has expired or has been fully satisfied. [Acts 1967, ch. 310, § 1.]

40-3803. Filing of petition.—To begin proceedings under this chapter, the petitioner shall file a written petition with the clerk of the court where the conviction occurred naming the state of Tennessee as the defendant. No filing fee shall be charged. [Acts 1967, ch. 310, § 2.]

40-3804. Contents of petition and supporting papers.—The petition shall briefly and clearly state:

1. Petitioner's full name and address;
2. The indictment number, if known, and the offenses for which the sentence was pronounced;

3. The name and location of the court which pronounced the sentence;
4. The date the sentence was pronounced;
5. The terms of the sentence;
6. What restraint of liberty is presently being imposed;
7. Who is imposing the present restraint, and when it commenced;
8. Any appeals and all other applications for relief previously filed including the date decided, the court, the grounds asserted and the result;
9. The names of the lawyers who have represented the petitioner and at what stage of the proceedings;
10. Facts establishing the grounds on which the claim for relief is based, whether they have been previously presented to any court and, if not, why not. If no prior petition under this chapter has been filed, the petition shall set forth each of the individual grounds, if any, required by the rules of the Supreme Court;
11. Whether the petitioner has a lawyer and, if not, whether he has funds to hire a lawyer; and
12. Any other information required by rule of the Supreme Court.

The petition shall have attached affidavits, records or other evidence supporting its allegations or shall state why they are not attached. [Acts 1967, ch. 310, § 3.]

40-3805. When relief granted.—Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the Constitution of this state or the Constitution of the United States, including a right that was not recognized as existing at the time of the

trial if either Constitution requires retrospective application of that right. [Acts 1967, ch. 310, § 4.]

40-3806. Processing of petitions by clerk of trial court.—When the clerk of the trial court receives any petition applying for relief under this chapter, he shall forthwith:

- (1) make three (3) copies of the petition,
- (2) docket and file the original petition and its attachments,
- (3) mail one (1) copy of the petition to the attorney-general and reporter, Supreme Court Building, Nashville,
- (4) mail or forward one (1) copy of the petition to the district attorney-general,
- (5) mail or forward one (1) copy to petitioner's attorney, and
- (6) notify the judge. [Acts 1967, ch. 310, §5.]

40-3807. Amendment of petitions not in prescribed form.—No petition for relief shall be dismissed for failure to follow the prescribed form or procedure until after the judge has given the petitioner reasonable opportunity, with the aid of counsel, to file an amended petition. [Acts 1967, ch. 310, § 6.]

40-3808. Petitions for habeas corpus may be treated as petitions under this chapter.—A petition for habeas corpus may be treated as a petition under this chapter when the relief and procedure authorized by this chapter appear adequate and appropriate, notwithstanding anything to the contrary in title 23; chapter 18 of the Code, or any other statute. [Acts 1967, ch. 310, § 7.]

40-3809. Procedure when petition is before the court.—When the petition has been competently drafted and all pleadings, files and records of the case which are before

the court conclusively show that the petitioner is entitled to no relief, the court may order the petition dismissed.

In all other cases the court shall grant a hearing as soon as practicable. The trial court shall issue such interlocutory orders, including a stay of execution, as may be required.

Where the petitioner is under the death sentence, the judge of any court of record with criminal jurisdiction in the county where the prisoner is confined or the justice of any appellate court may for good cause stay execution pending the filing of the petition with the trial judge and his interlocutory action thereon. [Acts 1967, ch. 310, § 8.]

40-3810. Presentation of evidence at hearing—Transportation of petitioner.—If the petitioner has had no prior evidentiary hearing under this act and in other cases where his petition raises substantial questions of fact as to events in which he participated, he shall appear and testify.

If the petitioner is imprisoned, the warden shall arrange for transportation of the petitioner to and from the court upon proper orders issued by the trial judge. The sheriff of the county where the proceeding is pending shall have the authority to receive and transport the petitioner to and from the penitentiary and the court, if the court so orders or if for any reason the warden is unable to transport him. The sheriff shall be entitled to the same costs allowed for the transportation of prisoners as is provided in criminal cases upon the presentation of the account certified by the judge and district attorney-general. [Acts 1967, ch. 310, § 9.]

40-3811. Scope of hearings.—The scope of the hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded

because they have been previously determined, as herein defined. [Acts 1967, ch. 310, § 10.]

40-3812. When ground for relief is "previously determined."—A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. [Acts 1967, ch. 310, § 11.]

40-3813. Furnishing certified copies of documents or other parts of the record to indigent petitioners.—If the judge finds that the petitioner is indigent as defined in § 40-2014, the judge is empowered to issue an order directed to the clerk of any court in Tennessee to furnish without cost to the petitioner certified copies of such documents or parts of the record on file in his office as may be required. [Acts 1967, ch. 310, § 12.]

40-3814. District attorney-general shall represent state.—The district attorney-general shall represent the state and respond by proper pleading on behalf of the state within thirty (30) days after receiving notice of the docketing or within such time as the court orders. If the petition does not include the records or transcripts, or parts of records or transcripts that are material to the questions raised therein, the district attorney-general is empowered to obtain them at the expense of the state and shall file them with the responsive pleading or within a reasonable time thereafter. The district attorney-general shall be reimbursed for any expenses including travel incurred in connection with the preparation and trial of any proceeding under this chapter. This expense shall be paid by the state of Tennessee, and shall not be included in the expense allowance now received by the various district attorneys-general.

It shall be the duty and function of the state attorney-general and his staff to lend whatever assistance may be necessary to the district attorney-general in the trial and

disposition of such cases. In the event an appeal is taken or a delayed appeal in the nature of a writ of error is granted, the state attorney-general and his staff shall represent the state and prepare and file all necessary briefs in the same manner as now performed in connection with criminal appeals. [Acts 1967, ch. 310, § 13.]

40-3815. Dismissal, withdrawal or amendment of petitions.—The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief. The district attorney-general shall be allowed a reasonable time to respond to any amendments.

The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, with aid of counsel, to file amendments. [Acts 1967, ch. 310, § 14.]

40-3816. Recording of evidentiary hearings.—All evidentiary hearings shall be recorded. [Acts 1967, ch. 310, § 15.]

40-3817. Taking of evidence.—Evidence may be taken orally or by deposition, or in the discretion of the judge by affidavit. If affidavits are admitted, any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits. [Acts 1967, ch. 310, § 16.]

40-3818. Final disposition of petitions.—If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, the court shall vacate and set aside the judg-

ment or order a delayed appeal as hereinafter provided and shall enter an appropriate order and any supplementary orders that may be necessary and proper. Costs shall be taxed as in criminal cases.

Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground.

Where the petitioner has court-appointed counsel, the court may require petitioner's counsel to file a verified statement of dates and times he has consulted with petitioner and this statement shall become a part of the record. [Acts 1967, ch. 310, § 17.]

40-3819. Notice of final judgments by clerk of court.—The clerk of the court shall send a copy of the final judgment to the petitioner, the petitioner's counsel of record; any authority imposing restraint on the petitioner and the attorney-general and reporter at Nashville. [Acts 1967, ch. 310, § 18.]

40-3820. When petitioner denied right of appeal in violation of the Constitution—Procedure.—When the trial judge conducting a hearing pursuant to this chapter finds that the petitioner was denied his right to an appeal in the nature of a writ of error from his original conviction in violation of the Constitution of the United States or the Constitution of the state of Tennessee and that there is an adequate record of the original trial proceeding available for such review, the judge can:

- (1) If a bill of exceptions was filed, grant a delayed appeal in the nature of a writ of error.
- (2) If, in the original proceedings, a motion for a new trial was filed and overruled but no bill of exceptions was

filed, authorize the filing of the bill of exceptions in the convicting court and the order authorizing the filing shall be deemed to be the order or action of the court which occasioned the filing of said bill of exceptions as authorized by § 27-111.

(3) If no motion for a new trial was filed in the original proceeding, authorize such motion to be made before the original trial court within thirty (30) days. Such motion shall be disposed of by the original trial court as if the motion had been filed under authority of § 27-201.

Any bill of exceptions filed pursuant to this section may be approved by the judge of the court wherein the petitioner was convicted irrespective of whether such judge presided over the case at the time of the original trial.

An order granting proceedings for a delayed appeal shall be deemed a final judgment for purposes of the review provided by § 40-3822. If either party does appeal, the time limits provided in this section shall be computed from the date the clerk of the trial court receives the order of the appellate court determining the appeal.

The judge of the court which sentenced a prisoner who has sought and obtained relief from that sentence by any procedure in a federal court is likewise empowered to grant the relief provided in this section. [Acts 1967, ch. 310, § 19.]

40-3821. Determination of indigency—Appointment of counsel and court reporters.—Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by §§ 40-2014-40-2043. [Acts 1967, ch. 310, § 20.]

40-3822. Appeal after final judgment.—The order granting or denying relief under the provisions of this chapter shall be deemed a final judgment, and an appeal may be

taken to the Court of Criminal Appeals by simple appeal. A motion for a new trial shall not be required for such appeal. [Acts 1967, ch. 310, § 21.]

40-3823. Supreme Court may promulgate rules of practice and procedure.—The Supreme Court may promulgate rules of practice and procedure consistent with this chapter, including rules prescribing the form and contents of the petition, the preparation and filing of the record and assignments of error for simple appeal and for delayed appeal in the nature of a writ of error and may make petition forms available for use by petitioners. [Acts 1967, ch. 310, § 22.]

*** 40-3824. Bail during new trial or delayed appeal—Exception.**—When a new trial or delayed appeal in the nature of a writ of error is granted, release on bail shall be discretionary with the trial judge pending further proceedings. In all other cases the petitioner shall not be entitled to bail. [Acts 1967, ch. 310, § 23.]

Effective Date. Acts 1967, ch. 310, § 28.

July 1, 1967.

